APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

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May 19.

C. T. GURUSWAMY AND TWO
v.
D. K. S. EBRAHIM.*

Code of Criminal Procedure (V of 1898), section 476—Complaint whether to be confined against parties to the proceedings before Court—Relation of section 476 to section 195 (b) and (c).

Held, that it is not open to a Court to make a complaint under section 476 of the Code of Criminal Procedure in respect of any person other than persons who are parties to the proceedings before it.

Per ROBINSON, C.J.—"By the recent amendment of the Code of Criminal Procedure . . . . . it was not intended that the complainant should not be examined except in the case where the accused had appeared before the Court as a party to the proceeding. Further, I am of opinion that the words 'the offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*)' in section 476 must be read in conjunction with the wording of section 195 (1) (*c*). The only offence which section 195 (1) (*c*) bars from the cognizance of the Magistrate without a complaint by the Court is when such offence is alleged to have been committed by a party to any proceeding before that Court, and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in section 195 is."

Abdul Khadar and others v. *Mecra Saheb*, 15 Mad., 224 ; *Akhil Chandra De and another* v. *The Queen-Empress*, 22 Cal., 1004 ; In re *Devji Valad Bhava'ni and another*, 18 Bom., 581 ; In re *Keshav Narayan Manolkar*, 14 Bom. L.R., 968 ; *Kallaru Ramalingam and another* v. *Thupili Subramayya and another*, 18 Mad. L. T., 488—*referred to.*

In certain insolvency proceedings instituted in the High Court by one S. P. S. Mani Iyer, one of the three present appellants, the learned trial Judge (Rutledge, J.) formed the opinion that there had been a flagrant tampering of the records of the Court and passed orders forwarding the case for inquiry to the District Magistrate of Insein. The appellants thereupon preferred separate appeals to the High Court against the orders in question.

* Civil Miscellaneous Appeals Nos. 41 and 42 of 1924.

The following is a summary of the facts arising as found in the judgment of the learned Chief Justice :—

One S. P. S. Mani Iyer filed a petition before the Judge of the High Court, sitting in insolvency, praying that the respondents, D. K. Cassim & Sons, be adjudicated insolvents. The ground of insolvency alleged was that their immoveable property in the Insein district had been under attachment for over three weeks. The respondents filed an affidavit, in which they declared that their financial position was very good. The petitioner claimed that they were indebted to him in a large sum of money on two promissory-notes. The respondents denied that they owed him any money. The affidavit sets out that S. P. S. Mani Iyer is a creature of their business rival and enemy, Abdul Rahman, and it gives reasons for that enmity. They denied the alleged act of insolvency, and alleged that the attachment warrants had been tampered with and fraudulently altered as to the dates so as to make it appear that the properties had been attached for over three weeks.

Briefly stated, it is alleged that execution was taken out; that warrants of attachment were executed on the 27th November; that the dates on the attachment warrants had been altered to 20th and 21st November; that the Court's diary had been altered; that a page or pages covering the dates in question in the Court's register showing the issue of the warrants had been torn out; and that the dates in the warrants do not agree with the Bailiff's register which had not been tampered with. It is further alleged that the three appellants before us had approached the process-servers, the Bailiff's Head Clerk and the Bailiff to alter the dates in their registers likewise.

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The petitioner gave evidence, denying that he had ever been to Insein in connection with this case. He says that, so far as he knows, Abdul Rahman never went to Insein in connection with this case, and that up to date he had not seen the original record of the Insein Court. He alleged that he sent Guruswamy to get copies for him; that he sent him twice; and that he brought back copies which were handed over to his Advocates who then prepared the petition praying for adjudication. He denies knowing Mudaliar, an interpreter attached to the District Court of Insein. He says that he had never spoken to him; that he never spoke to any process-server or clerk of the District Court of Insein; and that he never went to Insein or saw the record.

All these statements are flatly contradicted by the witnesses for the respondents.

Mudaliar says that he knows the parties, that he met them and spoke to them; and that he checked the copies supplied to Guruswamy.

The Bailiff swears that the warrants were served on the 27th. The two process-servers gave evidence to the same effect—two pleaders who signed the applications for copies gave evidence. The process-servers also depose to an attempt made to bribe them.

On the 22nd February last the learned Judge passed his order on the petition to adjudicate the respondents. After dealing with that case, he says :—"On this evidence I am clearly of opinion that the repondents' lands were not attached on either the 20th or 21st of November, 1923, and that the petitioner's application accordingly must be dismissed." The learned Judge continues :—"The matter, however, does not end there, as there has obviously been flagrant tampering with the records of the Court by some person or persons." He then

proceeds to consider at length the evidence to which I have referred, and he ends the order as follows :— "The tampering with Court records is a very serious matter, and, on the evidence as given before me, it is incumbent on me to order a *judicial* enquiry. But, before sending the case for enquiry to the District Magistrate of Insein, Abdul Rahman and Guruswamy should be given an opportunity to be heard. I accordingly call upon V. M. Abdul Rahman, the petitioner, S. P. S. Mani Iyer, and Guruswamy to show cause why I should not order an enquiry under section 476 of the Criminal Procedure Code before the District Magistrate of Insein into offences under section 120 (*b*), read with sections 465, 466 and 109 of the Indian Penal Code by them."

On the matter coming up for hearing on the 3rd March, the date fixed for Abdul Rahman and Guruswamy to show cause, Mr. McDonnell for Abdul Rahman asked that five witnesses should be recalled for further cross-examination. They had already been cross-examined at length by one of the most experienced and senior members of the Bar on behalf of S. P. S. Mani Iyer. The learned Judge said that he would recall them if Counsel gave an undertaking to put his clients into the box for examination. Counsel who was not then aware that to examine his clients on oath would have been illegal, declined to give this undertaking. The order was then passed forwarding the case to the Court of the District Magistrate of Insein for enquiry.

The appeals were heard before a Division Bench composed of Robinson, C.J. and Brown, J., and the following judgments were delivered by their Lordships, that by the learned Chief Justice being in continuation of his summary of the facts already narrated.

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Keith, *McDonnell* and *Leach*—for the Appellants.

Burjorjee, *Patker* and *Gaunt*—for the Respondent.

ROBINSON, C.J.—Section 195 (*c*) of the Code of Criminal Procedure lays down that "no Court shall take cognizance of any offence described in section 463 . . . . . when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate." The provisions of section 195 (*c*) therefore clearly apply only in the case when such an offence is alleged to have been committed by a party to a proceeding.

Section 476 provides that when a Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing.

The question then is whether it is open to a Court to make a complaint in respect of any person other than persons who were parties to the proceedings before it.

Section 476 deals with any offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*).

On the one side, it is argued that the offence referred to in section 195 (1)(*c*) is the offence of forgery alleged to have been committed by a party to a proceeding. On the other side it is urged that it refers to the offences specified in section 195 (1)(*c*), and not to persons by whom those offences

had been committed; in other words, that the Court can take action in respect of the offence in regard to persons other than parties to the proceedings before it if they are implicated either as principals, conspirators or abettors. For this latter view there is something to be said, in that a Court having before it strong *primâ facie* evidence that an offence of forgery had been committed by a party to the proceedings before it, and also strong *primâ facie* evidence that other persons, who are not parties to the proceeding before it, were implicated in this offence as abettors or principals, should not be confined to laying a complaint against the former, and leaving it to the Magistrate to take action, if he sees fit, against the latter. To do so would mean that the accused would have the right to demand, when they were joined, that the trial should be held by some other Magistrate; or, if this objection was not taken, they would have the right to have all the witnesses recalled and re-examined; and that in either case there would be great delay which would tend to defeat the ends of justice. In my opinion however this argument cannot prevail.

By the recent amendment of the Code of Criminal Procedure the necessity for sanction to prosecute has been done away with altogether, and in the place of that sanction has been substituted a complaint made by a Court itself in writing. An addition has been made to section 252 to avoid the necessity for the examination of the complainant. That very necessary procedure is therefore omitted in such cases, and, that being so, it appears to me that the powers given by section 476 should be strictly confined to those granted. It was not intended that the complainant should not be examined except in the case where the accused had appeared before

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the Court as a party to the proceedings. Further, I am of opinion that "the offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*)" must be read in conjunction with the wording of section 195 (1) (*c*). The only offence which section 195 (1) (*c*) bars from the cognizance of the Magistrate without a complaint by the Court is when such offence is alleged to have been committed by a party to any proceeding before that Court; and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in section 195 is.

As no complaint by the Court is necessary in respect of Abdul Rahman or Guruswamy before the Magistrate can hold an enquiry or trial against them, it appears to me that it is not open to the Court, and it was not intended that the Court should lay a complaint covering them, as they were not parties to the proceedings before it. On this ground, in my opinion, the appeal must succeed.

There is no ground for interfering with the complaint so far as it is a complaint against S. P. S. Mani Iyer, and the Magistrate can proceed against him on the complaint already laid. But the complaint must, in my opinion, be set aside in so far as it affects Abdul Rahman and Guruswamy. It will, of course, be open to the Court if it sees good grounds for so doing, to take action against them also; or it will be open to the respondent to lay a complaint before the Magistrate in respect to them.

I would therefore accept the appeals as indicated above.

BROWN, J.—Before the recent amendment of the Code of Criminal Procedure there was a conflict of opinion as to the interpretation of section 476 of the

Code. The High Court of Bombay held that the power given under Chapter, XXXV of the Criminal Procedure Code to take action "regarding any offence referred to in section 195" was not ordinarily restricted in regard to offences relating to documents to such offences when committed by a party to the proceedings in which the document was given in evidence, (*In re Devji Valad Bhava'ni and another* (1). The same view was taken in *In re Keshav Narayan Manolkar* (2), and in the Calcutta case of *Akhil Chandra Dey and another* v. *The Queen Empress* (3). The High Court of Madras took the contrary view in the case of *Abdul Khadar and others* v. *Meera Saheb* (4). The question was discussed at length in the later Madras case of *Kallaru Ramalingam and another* v. *Thupili Subramayya and another* (5), and the decision in *Abdul Khadar's* case was followed. And the High Court of Calcutta have subsequently to *Akhil Chandra Dey's* case held that as regards clause (*b*) of section 195 of the Code, the qualification mentioned in section 195 is to be treated as incorporated in section 476. Judicial authority on the point is therefore fairly evenly divided. The recent amendments in sections 195 and 476 have resulted in connecting the two sections more closely together. Sanction cannot now be applied for under section 195, but no prosecution can now be instituted for the offences mentioned in section 195 unless orderd by the Court under section 476. Section 476 gives the Court power with respect to any offence referred to in section 195. I agree with the learned Chief Justice that the two sections must be read closely together and that the offence

(1) (1894) 18 Bom., 581.
(2) (1912) 14 Bom. L.R., 968.
(3) (1895) 22 Cal., 1004.
(4) (1892) 15 Mad., 224.
(5) (1916) 18 Mad. L.T., 488.

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referred to in section 195 (*c*) is not merely an offence under certain sections, but such an offence when committed by a party to the proceeding.

The Court therefore had no power to direct the prosecution of the two applicants in this case.

That being so it is not necessary to decide any of the other points raised in these appeals. I agree that the order directing the prosecution of C. T. Guruswamy and V. M. Abdul Rahman should be set aside.

APPELLATE CIVIL.

Before Mr. Justice Duckworth.

1924

May 26.

MA NYO AND ONE
v.
MAUNG HLA BU AND ONE.*

Civil Procedure Code (*V of* 1908), *section* 11, *Explanation* 4—*Order II, Rule* 2—*Suit for redemption of a usufructuary mortgage and a suit for* mesne *profits from date of refusal to permit redemption—Transfer of Property Act* (*IV of* 1882), *section* 76 (1).

Held, that a suit for redemption of a usufructuary mortgage and a suit for *mesne* profits from the date of the refusal to permit redemption arise out of the same cause of action ; and that after a suit for redemption of a usufructuary mortgage, a suit for *mesne* profits is not maintainable.

Po Tun v. *E Kha*, 9 L.B.R., 18—*referred to.*

Rukhminibai v. *Venkatesh*, 31 Bom., 527 ; *Satyabadi Behara* v. *Harabati*, 34 Cal., 223—*followed.*

Doraiswami v. *Subramania*, 4 Mad., 188 ; *Gaw Ya* v. *Talok*, 3 U.B.R., 141 *Mi Sa U* v. *Nga Meik*, 2 U.B.R., 81—*distinguished.*

Dutt—for the Appellants.

S. Mukerjee—for the Respondents.

DUCKWORTH, J.—For the purposes of this appeal, the following statement of the facts will suffice. The plaintiff-respondents, who had mortgaged some

* Special Civil Second Appeal No. 775 of 1921 (at Mandalay) from the decree of the District Court of Minbu in Civil Appeal No. of 68 1921.